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Supreme Court of the United States

OCTOBER TERM, 1948

No. 36

EARL H. McDONALD AND JOSEPH F. WASHINGTON,
PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED MARCH 16, 1948.

CERTIORARI GRANTED APRIL 19, 1948.

APPENDIX



INDEX TO APPENDIX.

	Page
I. Pleadings, Docket Entries and Other Papers	1
1. Indictment	2
2. Minutes of Court pertaining to arraignment and plea of 'Not Guilty'	4
3. Motion for Return of Property Seized and Mo- tion to Suppress, filed September 11, 1946.	5
4. Findings of fact and conclusions of law filed October 16, 1946	6
5. Waiver of jury trial	8
6. Minutes of Court pertaining to denial of Motion and verdict of 'Guilty'	8
7. Minute entries of Court showing sentence im- posed	9
II. Excerpts from Testimony and Proceedings	10
Witnesses:	
Barbara Terry	10
Howard Ogle	16
Earl McDonald	17
Howard Ogle	19
Paul Clarke	23
Proceedings in United States Court of Appeals for the District of Columbia	28
Opinion, Miller, J.	28
Dissenting opinion, Edgerton, J.	30
Judgment	32
Designation of record	33
Clerk's certificate	34
Order allowing certiorari	35

IN THE
United States Court of Appeals

DISTRICT OF COLUMBIA.

No: 9524.

EARL H. McDONALD, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

No. 9525.

JOSEPH F. WASHINGTON, *Appellant*.

v.

UNITED STATES OF AMERICA, *Appellee*.

**Appeal from the District Court of the United States for the
District of Columbia.**

JOINT APPENDIX.

I.

PLEADINGS, DOCKET ENTRIES AND OTHER PAPERS.

Indictment.

20

Filed in Open Court Aug 26 1946

District Court of the United States for the
District of Columbia

Holding a Criminal Term
July Term. A. D. 1946.

Grand Jury No. 33,133
Criminal No. 77468.

Violation Sections 1501, 1502 and 1504, Title 22, D. C. Code

UNITED STATES OF AMERICA

v.

EARL H. McDONALD, JOSEPH F. WASHINGTON.

The Grand Jury charges:

On or about the twenty-second day of June, 1946, and within the District of Columbia, Earl H. McDonald and Joseph F. Washington, unlawfully, feloniously and knowingly was concerned as owners, agents and clerks and in other ways in managing carrying on promoting and advertising a certain lottery commonly known as the numbers game.

Second Count:

And the Grand Jury further charges:

On or about the twenty-second day of June, 1946, and within the District of Columbia, Earl H. McDonald and Joseph F. Washington did have in their possession, unlawfully and knowingly, certain tickets, certificates, bills, slips, tokens, papers and writings, used and to be used, and

adapted, devised and designed for the purpose of playing, carrying on and conducting a certain lottery, commonly known as the numbers game.

Third Count:

And the Grand Jury further charges:

On or about the twenty-second day of June, 1946, and within the District of Columbia, Earl H. McDonald and Joseph F. Washington knowingly, unlawfully and feloniously did set up and keep a certain table for the purpose of betting and wagering money and property upon the results of horse races.

21. **Fourth Count:**

And the Grand Jury further charges:

On or about the twenty-second day of June, 1946 and within the District of Columbia, Earl H. McDonald and Joseph F. Washington knowingly, unlawfully and feloniously did set up and keep a certain place for the purpose of betting and wagering money and property upon the results of horse races.

GEO. E. McNEIL

*Asst Attorney of the United
States in and for the District
of Columbia.*

A True Bill:

JOHN D. BURRAGE
Foreman.

Friday, September 6, 1946

The Court resumes its session pursuant to adjournment:
Hon. Jennings Bailey, Presiding:

Criminal No. 77468

UNITED STATES

v.

EARL H. McDONALD

Come as well the Attorney of the United States, as the defendant in proper person, according to his recognizance; whereupon the defendant being arraigned upon the indictment, the reading whereof he specifically waives, pleads not guilty thereto, and for trial puts himself upon the country and the Attorney of the United States doth the like; and thereupon by consent of the United States Attorney the defendant is granted leave within Five (5) days to withdraw said plea and demur to, or move to quash the said indictment, or otherwise plead as he may be advised.

Criminal No. 77468.

UNITED STATES

v.

JOSEPH F. WASHINGTON

Come as well the Attorney of the United States, as the defendant in proper person, according to his recognizance; whereupon the defendant being arraigned upon the indictment, the reading whereof he specifically waives, pleads not guilty thereto, and for trial puts himself upon the country and the Attorney of the United States doth the like; and thereupon by consent of the United States Attorney the defendant is granted leave within Five (5) days to withdraw said plea and demur to, or move to

quash the said indictment, or otherwise plead as he may be advised.

24

Filed Sep 11 1946

*Motion for the Return of Seized Property and the
Suppression of Evidence*

Earl McDonald and Joseph F. Washington hereby move this Court to direct that certain property of which they are the owners a schedule of which is annexed hereto, and which on the 22nd day of June, 1946, at premises 1608 3rd Street, N. W., Washington, D. C., was unlawfully seized and taken from them by two members of the Metropolitan Police Department, to wit, Paul Clarke and Howard Ogle, be returned to them and that if be suppressed as evidence against them in any criminal proceeding. The petitioners further state that the property was seized against their will and without a search warrant.

CHARLES E. FORD PER H. C. ALDER
Attorney for Petitioners

I hereby certify that I have this 11th day of September, 1946, personally served a copy of the foregoing motion on the United States District Attorney for the District of Columbia.

CHARLES E. FORD PER H. C. ALDER
Attorney for Petitioners

25

Schedule of Properties Seized

1. Two adding machines.
2. One small suitcase containing certain memoranda and paper slips.
3. Currency and change in the amount of about Nine Hundred and Sixty Eight Dollars (\$968).

Filed Oct. 16 1946

Findings of Fact.

Defendant McDonald rented a room some time in October, 1945, from one Barbara Terry, who occupied premises known as 1608 Third Street, N. W. Previous to this the police had arrested McDonald at premises known as 522 Second Street, N. W. and found him in possession of a numbers headquarters. Receiving information that McDonald had moved his activities to his home at 2807 Thirteenth Street, N. W., the police placed the premises under observation and noted considerable activity which indicated to them that a numbers game was in operation. The police were getting ready to raid the Thirteenth Street premises when McDonald again moved, and they then learned he had located in the 1608 Third Street premises. The police had observed McDonald enter these premises early in the afternoon on several occasions and leave between 5:30 and 6:30 p. m., the hours during which operations of the headquarters of numbers games are customarily carried on. On no occasion while the police had the premises under observation did McDonald ever remain overnight. Three police

officers surrounded the Third Street premises on 27 June 22, 1946, the date of the offense charged in the indictment. One of the officers heard a noise that sounded like a typewriter or adding machine in operation. Adding machines are customarily used in connection with the crime of conducting a lottery through use of numbers slips. Officer Ogle raised a side window facing on the front porch of the premises and went in. He opened the front door for Officer Blick and opened the rear door to admit Officer Clark. These officers had neither a warrant of arrest nor a search warrant.

All the rooms in the premises were open except the one occupied by Defendant McDonald. These rooms were searched by the officers. McDonald rented the rear room on the second floor and this door was locked. Officer Ogle

placed a chair in front of this door, stood on it and looked through the glass transom above the door. He observed numbers slips and money piled on the table and there were adding machines on the table. Defendants McDonald and Washington were in the room. Officer Ogle called to McDonald that he might as well open the door and McDonald unlocked and opened the door.

Conclusions of Law.

Defendants may not avail themselves of a wrongful entry of the premises of Barbara Terry and a search of rooms, except insofar as the premises were occupied by or were in lawful possession of defendants. See *Gibson v. United States*, — App. D. C. —, 149 F. 2d 381, 384; *Shore v. United States*, 60 App. D. C. 137, 49 F. 2d 519.

When Officer Ogle looked through the glass transom into defendant McDonald's room he saw a crime actually in course of being committed. Both McDonald and Washington were in actual possession of numbers slips and of adding machines which customarily are used in promoting a lottery. The officers had the right to arrest defendants and in doing so require them to open the door of the room, enter the room and seize whatever articles appeared to be used in carrying on the crime.

The motion to suppress will be denied.

BOLITHIA J. LAWS

Chief Justice

October 16, 1946

29

Wednesday, November 13, 1946

The Court resumes its session pursuant to adjournment:
Hon. Henry A. Schweinhaut, Presiding:

Criminal No. 77468

UNITED STATES

v.

EARL H. McDONALD, JOSEPH F. WASHINGTON

Come as well the Attorney of the United States, as each defendant in proper person, each according to his recognizance, and each by his attorney, Charles E. Ford, Esquire; whereupon, upon stipulation of the Attorney of the United States, and each defendant by his counsel; and thereupon each defendant waives his right to trial by jury, and each defendant submits himself to trial by the Court; and thereupon the said trial is begun; whereupon after arguments by counsel the case is submitted.

31

Monday, January 20, 1947.

The Court resumes its session pursuant to adjournment:
Hon. Henry A. Schweinhaut, Presiding.

Criminal No. 77468

UNITED STATES

v.

EARL H. McDONALD, JOSEPH F. WASHINGTON

Come as well the Attorney of the United States, as each defendant in proper person, according to his recognizance, and the defendant Earl H. McDonald by his attorney, Charles E. Ford Esquire, and the defendant Joseph F. Washington by his attorney, Clifford Alder, Esquire; and thereupon each defendant's motion for the return of seized

property and suppression of evidence heretofore argued and submitted in this case is by the Court denied; whereupon each defendant is found guilty as indicted and the case is referred to the Probation Officer of the Court; and thereupon each defendant is permitted to remain on bond pending sentence.

32

Friday, March 28, 1947

The Court resumes its session pursuant to adjournment:
Hon Henry A. Schweinhaut, Presiding:

Criminal 77468

UNITED STATES

v.

EARL H. McDONALD

Come as well the Attorney of the United States, as the defendant in proper person, according to his recognizance, and by his attorney, Charles E. Ford, Esquire; and thereupon it is demanded of the defendant what further he has to say why the sentence of the law should not be pronounced against him and he says nothing except as he has already said; whereupon it is considered by the Court that, for his said offense, the said defendant be committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Six (6) months to Eighteen (18) months.

Criminal No. 77468

UNITED STATES

v.

JOSEPH F. WASHINGTON

Come as well the Attorney of the United States, as the defendant in proper person, according to his recognizance,

and by his attorney, Charles E. Ford, Esquire; and thereupon it is demanded of the defendant what further he has to say why the sentence of the law should not be pronounced against him and he says nothing except as he has already said; whereupon it is considered by the Court that, for his said offense, the said defendant be committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Sixty (60) days.

II.

EXCERPTS FROM TESTIMONY AND PROCEEDINGS.

Barbara Terry was called as a witness for and in behalf of the defendants,

Direct Examination

By Mr. Ford: —

Q. Give us your full name. A. Barbara Terry.

Q. Where do you live? A. 1608 3rd Street, Northwest.

Q. In the District of Columbia? A. Yes.

Q. How long have you lived there? A. Eight years.

Q. And directing your attention particularly to June 22nd, of '46, of this year, were you still living there? A. Yes, sir, I was.

Q. And do you live in those premises today? A. I do.

Q. Now, I am directing your attention to the 22nd of June, and while you were in your premises did something unusual occur? A. Yes, it did.

Q. As you started to walk in the hallway, that is, the hallway on the first floor, what occurred? A. Well, as I came from the kitchen, I went to my bedroom, and

I opened my door, and there is a door that closes from the hall, and I found this man in my room, which I later learned was an officer.

Q. Directing your attention to that man, is that the man that was in your bedroom? A. Yes, sir.

[After Detective Sergeant Ogle and Lieutenant Blick had been identified, the examination continued.]

Q. When Detective Sergeant Ogle opened the storm door, did that man enter? A. He did.

Q. Then that made three of you, you, Detective Sergeant Ogle and this other officer? A. Yes.

Q. What happened next? A. Mr. Ogle went back through the hall to the kitchen door, unlocked the kitchen door and unhooked the screen door, and called for another gentleman to come in.

Q. After he let him in the rear door in the kitchen, then what happened? A. Well, he searched in the pantry on his way from the kitchen, and in the middle room.

Q. That is the middle room on the first floor? A. Yes. He continued up the steps, in fact, all did, and so naturally I went behind them.

Q. Now, we come to the steps, and you said they went up? A. Yes.

Q. Will you describe for me, please, going upstairs? Is that steps that lead to the second floor? A. It is.

Q. Did the officers to go up those steps after they looked in the other rooms? A. They did.

Q. What happened when they got to the second floor? A. Well, they went up. Mr. Ogle went up to the bedroom doors and he searched in the closets.

Q. Which room? A. In the front room on the second floor.

48 Q. That would be the room over your bedroom; correct? A. Yes.

Q. Now, did Ogle go into that room and make a search? A. Yes.

Q. What else did he do? A. There is a closet in the hall, and a clothing closet, and he opened that and looked through that.

He went in the middle bedroom on the second floor, searched through that, and opened the closet, and the next is the back room, and when he gets to the back room, the door, it was locked.

Q. Now, the back room on the second floor, would that be the room directly over the kitchen? A. Yes; partly over the kitchen.

Q. Now, you said—were all the other doors except the door on the back room open? A. Yes.

Q. Now, when he came to the room on the rear that had the door closed—it was locked, wasn't it? A. It evidently was because he went back to the middle bedroom and got a chair and looked over the transom.

Q. When he got the chair, did he bring it out of the middle room and put it against the door to see? A. That is right.

Q. Now, the door that was locked in the back, was there a transom over that door? A. Yes.

Q. If you get a chair or something, a stepladder, or something, can you look through the transom if you stand on it and see in the back room? A. Yes.

Q. When he got, Ogle got the chair and looked in, what was said or what transpired? A. He said to open the door.

Q. Now, did he say that or direct that to somebody inside the locked room? A. Yes.

Q. Who occupied that back room with the locked door? A. Mr. McDonald.

Q. And does he rent that room from you? A. Yes, sir, he did.

Q. And when was it he came there and rented that room from you? A. I can't recall the exact date, but it was October of 1945.

Q. Would you say it would be a fair statement that he has been renting that eight or nine months? A. He had been a roomer there; yes.

Q. Now, when Ogle yelled to open the door, what happened? A. They opened the door.

50 Q. And then was that door opened from the inside; correct? A. Yes.

Q. How was it opened, the door, after Ogle said: Open that door? A. I could not see how he opened the door.

Q. When the door was opened, who did you see? A. I saw Mr. McDonald and Mr. Washington.

Q. Those are the two men that sit here? A. Yes, but I didn't know they were in the house.

Q. Then what did the officers do? A. They proceeded to talk to them and told them what they were doing.

Q. Was that to these two men? A. That is right.

Q. And then the officers carried out some, what is known as gambling equipment; is that right? A. That is right.

Q. And they took some pictures inside the room, did they not? A. They didn't allow us to go in the room.

Q. Coming back to the time when you saw Ogle standing in the middle of your bedroom, or in your bedroom, do you know how he got in there? A. There was only one
51 way to get in. There is a porch window.

Q. How was that? A. The window was, the porch window was partly opened, and how he got it opened, I don't know. That would be the only way because in the basement, the window down there wasn't open.

Q. Did you at any time invite these officers into these premises? A. No, sir, I didn't.

Q. Did you at any time admit them into the premises? A. No, sir, I didn't.

Q. Did they at any time ask you if they could come in your premises? A. No, they didn't because had they asked me, I would have admitted them.

Q. And they didn't ask you? A. They didn't ring the bell or knock at the door.

Q. Are any of these other rooms in that house rented to any other people? A. Yes.

52 Cross Examination

By Mr. Burke:

Q. When was the first time you knew what he was doing there? A. When he told me, when he went upstairs and said that he was looking for someone. I didn't know then and he didn't call any name of who he was looking for.

Q. When was the first time you knew who he was, Ogle?

A. When he went to open the front door. He said:
53 I am a police officer and showed his badge, but that was all he said to me, and then he brushed me aside.

54 Q. Now, you say you didn't know he was running a lottery there? A. I didn't.

Q. And you would not have tolerated it if you had known it? A. Of course not.

Q. And you would be most anxious to cooperate with the police stopping any such goings on? A. Anxious to cooperate with the police?

Q. In stopping that sort of thing. A. What do you mean?

Q. Running a lottery, a numbers game in your house?

A. I would not rent my room to anyone to do that.

Q. You would not want that to continue after it was known to you? A. I certainly would not.

55 Q. And you would be glad to help the police stop that sort of thing? A. By the mere fact that I would not rent my room for that.

Q. But if the police came in looking for such a thing, you would want to cooperate? A. If they came to my door and knocked at my door, or rang my bell, I would admit them.

My objection is the manner in which they came in the house.

Q. You don't object to the fact that they came in your house after a law violator? A. I object to the manner.

Q. You said if you had known what they were after, you would be glad to let them in? A. If they knocked on the door, I would have admitted them.

Q. So that now that you know what they were doing, do you object to their going in there to look for a man violating the law?

Mr. Ford: I object to what she knows now.

The Court: I think she can answer the question.

56 By Mr. Burke:

Q. Do you object to the officers doing that? A. I object to the manner they came in.

Q. What did you tell them? A. I object to the way they came in.

Q. When did you tell them that? A. I told them there.

Q. After you knew they were officers? A. Yes, after I knew they were officers.

Q. Mr. Washington didn't have any right to come in your house? A. I didn't know he was in there.

Q. He didn't rent from you? A. No.

Q. Mr. McDonald didn't have any right to use your bedroom, did he? A. My bedroom?

Q. Yes. A. He never used it.

Q. Well, the rent he paid didn't entitle him to go in your bedroom? A. He wasn't in my bedroom.

Q. He wasn't entitled to go in there as a roomer? A. No one is entitled to go in there.

Q. Now, when the officer looked over the transom, 57 you say he stood on a chair? A. Yes, he did.

Q. And he didn't open the door himself but asked the occupant to open the door; is that right? A. That is right.

Q. And you don't know what was taken out of this room, do you? A. No, because they put me in the front room and told me to stay there.

Q. Were you on the second floor when they looked through the transom? A. Yes, I was.

Q. When were you asked to go to the front room? A. When they went into the room.

Q. So you could not see whether anything was taken out of the room? A. I saw it when they brought it out.

Q. What did they bring out? A. Some papers and some machines.

60 **Officer Howard E. Ogle** was called as a witness for and in behalf of the defendants,

61 Q. Now, I will ask you on that day in those premises, were you in a front room of that house? A. Yes, sir.

Q. By yourself, were you, when you were first in that room? A. No, sir.

Q. Who was with you in that room when you were first in that room? A. Barbara Terry.

Q. Anyone else? A. At the first moment, no; later on.

Q. That is the time I am talking about. A. Yes.

Q. How did you get in the room at that time? A. I went through a side window going off the porch.

Q. Now, speaking of the side window, this side window of that room on the porch is designated as what? Is this front porch of this house a metal porch, that you go into the front door? A. Yes.

62 Q. And this window you speak of would be in the bay window, closest to the porch? A. Yes.

Q. It would be on your left? A. Yes.

Q. Did you go through that window? A. Yes.

Q. How? A. The window was unlocked and I raised it and went through.

Q. The window was unlocked and you raised the window, did you? A. That is right.

Q. And you climbed into it? A. Yes.

Q. Into that room? A. Yes.

Q. Is that right? A. Yes.

Q. Then, after you got in the room there came a time when you went out of the room to the front door of the house and let someone else in from the front? A. Yes; later on.

Q. And that was Detective Sergeant Blick? A. Lieutenant Blick.

Q. And then he joined you in the house? A. Yes.

63 Q. Now, at that time did you have any search warrant of any kind for those premises? A. I did not.

Q. At that time did you have a warrant of arrest, or any kind of warrant, for Earl McDonald, who sits here? A. I did not.

Q. At that time did you have any kind of warrant for Joseph Washington, who sits here? A. I did not.

Q. Did you at that time have any kind of warrant for a Mrs. Terry? A. I did not.

64 **Earl H. McDonald** was called as a witness in behalf of the defendants.

Q. Now, I will ask you to direct your attention to June 22nd, of this year, and premises 1608 3rd Street, Northwest, and ask you whether or not on that day you were in those premises? A. Yes, sir, I was.

Q. Did you live and work in these premises? A. Yes, sir.

Q. What part of the premises did you occupy? A. The rear room on the second floor?

Q. Who did you rent from? A. Mrs. Terry.

Q. And that is the lady who testified here a minute ago? A. Yes.

Q. Did there come a time when you—by the way, you said you lived and worked there? What kind of work
65 did you do there on that day? A. I had a numbers business.

Q. And you were gambling in that room; is that correct?

A. Yes.

Q. On that day did Detective Sergeant Ogle and other officers take some equipment and papers out of that room?

A. Yes, sir.

Q. And who owned those papers and that equipment?

A. I did.

Q. Did you at that time on that day give these officers permission to come in that room? A. No, sir.

Cross Examination

By Mr. Burke:

Q. What was the equipment that they removed from that room? A. Some tickets, and I think it was two adding machines. One of them was broken.

Q. Numbers tickets? A. Yes, sir.

Q. And the adding machines were used to make up your totals? A. They were at times used for that purpose.

66 Q. Were you using them that day? A. Not at that time, sir.

Q. What was the gentleman, Washington, doing in there with you? A. I just had him in there along with me.

Q. Just a friend? A. He is a friend; yes, sir.

Q. And he is not—he didn't occupy the room with you? A. No, sir.

Q. Was that room your home? A. Yes, sir, more or less. I stayed there occasionally.

Q. I beg your pardon. A. I stayed there occasionally.

Q. Where did you stay when you didn't stay there? A. At 13th Street, Northeast.

Q. That is your home at 2807 13th Street, Northeast, is it not? A. That is correct.

Q. Now, when you rented the room, did you tell the landlady what purpose you wanted it for? A. I told her I was having trouble at home and wanted a place to stay.

Q. Did you tell her you were working on the railroad?

A. I don't remember.

Q. How did these gentlemen, these officers, get
67 into your room? A. One of the officers, the gentleman known as Mr. Ogle, had a chair or something outside the room, and he pushed open the transom, and when he looked in there, he said: All right, Earl; we are in the house now. You might just as well open the door. So I opened the door.

Q. And you let him in? A. Yes.

Mr. Ford: He opened the door in response to some command. There is quite a difference.

The Court: It is a proper question.

By Mr. Burke:

Q. He was followed by Blick and Clark? A. Yes.

Mr. Burke: That is all.

Mr. Ford: That is all; step down.

(Thereupon the witness was excused and retired from the witness stand.)

Mr. Ford: That is our case, may it please your Honor.

Mr. Burke: I move to dismiss the motion as to the defendant Washington. As to him nothing has been shown whatsoever of any property taken and no right of possession.

70 **Officer Howard E. Ogle** was called as a witness for and in behalf of the United States.

71 Direct Examination

By Mr. Burke:

Q. Officer, when you went to this place and arrested Mr. McDonald, at that time, what knowledge had you of his having engaged at any time in the numbers business?

Mr. Ford: May we have the date of this knowledge?

By Mr. Burke:

Q. Did you have any such knowledge? A. Yes, sir.

Q. What was that knowledge? How did you acquire it?

A. I have known Earl McDonald for a number of years. Less than a year ago I had occasion to arrest him in his supposed residence at that time at 522 2nd Street, Northwest, and his home—he lived at twenty—I think it is 2807.

Mr. Ford: I object to that as being a conclusion.

The Court: He has already said that.

The Witness: I know his home and he lives in, I think it is 2807 13th Street, Northwest. I seen him go in that house, I guess, fifty times.

By Mr. Burke:

Q. What did you find when you arrested him last
72 year on 2nd Street? A. A numbers headquarters, adding machines, numbers, telephones.

Q. What did you know about his use of this address on 3rd Street, 1608? A. I had received information that he had moved his activities from 522 2nd Street, Northwest, to his home, and we watched his home, and we saw quite a bit of activity, and we were getting ready to raid him when he suddenly left there, and he moved, and we got information he went to 1608 3rd Street, on the second floor, back room, and there I had watched him myself go in the house, the usual hours, between 1:30 and 2 o'clock.

Q. Afternoon or morning? A. Afternoon.

Q. Yes, go ahead. A. And he drove up in his car, 103,565. He has a Cadillac, a green Cadillac, and that became very hot. We knew him everywhere we saw him. So he got himself another car, 103,565, and I have seen him in that car, and on numerous occasions this car would be parked in the 1600 block of 3rd Street, and he would be in there from 1:30 until 5:30, and he would go out and get in the car and go away.

Q. Do those hours mean anything in the operation of the numbers game? A. That is the only time they op-

73 erate, as far as headquarters operations is concerned.

Q. What do you mean, headquarters operations?

A. Where they gather all the numbers and take them into the place, run them up on the adding machines, and give out the first, second, and third number over the telephone.

Q. And they do that between what hours? A. The races start about 2 o'clock in the afternoon and last until five, and I had occasion at this house, 1608 3rd Street, while we were there the phone rang, I would say, one hundred times. I answered on more than one occasion.

Q. After you went in? A. No.

Mr. Ford: I object to this.

The Court: Yes.

By Mr. Burke:

Q. Before you went in, you observed he left at 5 o'clock?

A. Well, about—

Mr. Ford (interposing): He said the races run from 2 to 5:30.

The Court: I will permit the question.

The Witness: I have seen him come out.

By Mr. Burke:

Q. What time did he usually leave? A. Between 5:30 and 6:30.

74 Q. Did you observe him stay at the house all night or at any later hour? A. No, I have never seen that car at night out in front of the house. I have seen the Cadillac in front of his own home.

Mr. Ford: That is not responsive. He is talking about an automobile now.

Mr. Burke: All right.

By Mr. Burke:

Q. Did you at any time hear anything from this address, 1608 3rd Street, Northwest, while you were observing there?

A. I did not but Detective Sergeant Clark did.

Mr. Ford: I object to what Clark said.

The Witness: I did not.

The Court: Mr. Ford, do not worry about the testimony. I will hear it.

Mr. Ford: I realize your Honor will separate it.

By Mr. Burke:

Q. Had you any other knowledge about his record of engaging in the numbers game, besides the fact you had arrested him once and that you received information during the past year? A. I know he is classed as a numbers operator on a very large scale.

Q. Now, after you got in the house, after you went upstairs, what did you do just before you entered the
75 room? A. He had his room on the second floor, the rear room, and the room was locked and I would not break the door open, and I stood on a chair and looked over the transom, and I saw Earl and Washington in the room, saw the adding machines and the numbers piled on the table, and I saw all the money piled on the table, and he was standing in a corner, and I said: Earl, open the door, and he opened the door and I walked in the room.

Q. Did you speak through the transom or through the door? A. I was standing on a chair at the time that I said: Earl, open the door, and Earl, he came around, and I stayed on the chair and he opened the door, and I got off the chair and he opened the door, and I got off the chair and walked in.

Q. Was the transom open or shut? A. As I recall, it was closed. It was closed.

Q. Did you open it? A. No, sir.

Mr. Burke: That is all.

Cross Examination

By Mr. Ford:

78 Q. Now, with all of this information that you told us you had about how many times would you say you

have applied to a United States Commissioner or a Judge to get a warrant either of arrest or a search warrant? How many times would you say you have obtained and executed them? A. I have talked it over on a few occasions with Mr. Turnage.

Q. I am asking you about McDonald. How many times have you applied to anyone—you know where the Commissioner is? A. Yes.

79 Q. And he issues search warrants? A. Yes.

Q. And you have known that for years and you have been through that procedure? Now, let me ask you this: With this information that you have told His Honor that you had about Earl McDonald, did you take that information to a United States Commissioner or any Judge in the District of Columbia and obtain either a warrant of arrest or a search warrant for Earl McDonald? A. I have applied on a few occasions but I never obtained a warrant.

Q. And that was the same situation this time as when you said you arrested him before, a year ago, and you didn't have a warrant then of any kind, did you? A. No, sir. He didn't live there either.

Officer Paul H. Clark was called as a witness for and in behalf of the United States.

80 Direct Examination

By Mr. Burke:

Q. State your full name. A. Paul H. Clark, Sergeant, Metropolitan Police, Detective Bureau.

Q. You participated in the arrest of Earl McDonald and Joseph Washington on June 22, 1946, at 1608 3rd Street, Northwest? A. I did, sir.

Q. On that day theretofore, did you have that place of this defendant under observation? A. We did, sir.

Q. For how long? A. For a period of two months, to my knowledge.

Q. Did you at any time hear any noises coming from that house of any particular description? A. Just prior to the entrance to the house on that day, Lieutenant Blick and Sergeant Ogle went to the front, and I went to the rear on the alley, and there was a fence in the alley and a yard perhaps 20 or 25 feet long, and I could hear a noise, it sounded like it was a typewriter or an adding machine, I could not say which it was, but it sounded to me as it could be a typewriter or an adding machine.

I stayed there until Sergeant Ogle came to the back door of the house with this Mrs. Terry, and we entered the house.

81 Q. Will you tell us whether that machine was electric or manual? A. It sounded to me as if it was an electric machine.

Mr. Ford: He said he didn't know which it was.

The Court: That is argumentative.

By Mr. Burke:

Q. Do you know how adding machine may be used in the operation of numbers games? A. It is used to run what they call the run down tape for the total number slips for each individual operator. They add up the totals on the pads and that is run on the tape, and generally speaking, they have two tapes in the adding machine, a duplicate tape. A One is held by the person that tallies down, and the other tape is sent back to the person who supplies the numbers pads, and which shows their play for that day and the amount of their play for that day.

Q. Have you, to your knowledge, ever known the defendant to have used adding machines before in the operation of the numbers game? A. Yes, sir.

Q. This defendant, McDonald? A. Yes.

Q. Did you hear any other noises, such as clicking or humming or whirring from that house that day? A. The

82 only noise I heard was the noise of this machine running, and it sounded as if it might have been an adding machine:

Mr. Burke: You may inquire.

Cross Examination

By Mr. Ford:

Q. Do you break into every place where you hear a machine and where you don't know whether it is an adding machine or a typewriter? A. What do you mean?

Q. Do you break in every place from which you hear a sound and which you do not know whether it is the sound of an adding machine or a typewriter? A. Whenever I have enough, sufficient evidence to give me probable cause to enter any premises in the District that is committing a felony, we will enter the premises.

Q. Whenever you have enough evidence to make you believe that is probable cause? Why didn't you go to the duly constituted authority and get a warrant, a warrant of arrest or search warrant? A. Sometimes that is not the best thing to do.

Q. That is right. A. For one reason, that is the fact that when once you visit these premises, and if we leave the premises and go to the United States Commissioner's Office, when we return to the premises, I will say in 99
83 per cent of the cases, there will be nothing there.

Q. You don't mean that some of the police officers will tell them that you have been there and they get away? A. No, sir.

Q. I understood you to say that is not the best thing to do. When you determine it is not the best thing to do, in those cases you determine it because the duly constituted authority won't issue a search warrant? A. I didn't say that.

Q. In this case the United States Commissioner refused to issue any warrant after you had gone there and discussed

it with him; isn't that so? A. I believe, probably, we discussed it with him, this last case.

Q. You know Detective Sergeant Ogle? A. Yes.

Q. Didn't he on three occasions discuss it with the United States Commissioner? A. To the best of my recollection, on several occasions we have discussed a similar set of facts.

Q. I want to know whether or not you know Sergeant Ogle went in this case three times to the United States Commissioner and could not get a warrant? A. No, sir.

Q. Of course, you are with Detective Sergeant
84 Ogle every day and practically every night? A. That is right.

Mr. Ford: I have no further questions.

Mr. Burke: That is all.

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United States Court of Appeals

DISTRICT OF COLUMBIA

No. 9524

EARL H. McDONALD, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 9525

JOSEPH F. WASHINGTON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeals from the District Court of the United States for the
District of Columbia

Argued October 8, 1947

Decided February 16, 1948

Mr. Charles E. Ford, with whom *Mr. John Lewis Smith, Jr.*, was on the brief, for appellants.

Mr. John P. Burke, Assistant United States Attorney, with whom *Mr. George Morris Fay*, United States Attorney, was on the brief, for appellee. *Messrs. Sidney S. Sachs* and *John D. Lane*, Assistant United States Attorneys, also entered appearances for appellee.

Before EDGERTON, CLARK and WILBUR K. MILLER, JJ.

WILBUR K. MILLER, J.: Appellants were tried on four counts for promoting a lottery, possessing lottery tickets, and keeping a "place" and a "table" for betting on horse races. D. C. CODE (1940) §§ 22-1501, 1502, 1504. Their motion before trial for the return of the seized property and suppression of evidence was denied. Having been found guilty on all counts, they appeal, contending the property should have been returned and the evidence suppressed because obtained in violation of their constitutional right to freedom from unreasonable search and seizure.

The police believed that appellant McDonald operated a numbers headquarters. They kept his home under observation for some time and saw "quite a bit of activity" there. He had previously been arrested for numbers operations. On being told that he had moved

to the residence of a Mrs. Terry, where he occupied a back room on the second floor, the police set a watch on the house. Several times they saw him enter this house in the early afternoon, when numbers operators customarily go to their headquarters, and leave in the late afternoon, when they customarily leave.

On the afternoon of June 22, 1946, police officers Ogle, Blick and Clark watched the Terry house. One of them heard a noise that sounded like an electric typewriter or an adding machine; he "could not say which it was." It was proved at the trial that there was an electric sewing machine in the house, which made a similar sound, and that adding machines are often used in numbers operations. The outer doors of the house were locked. Officer Ogle opened a window and entered Mrs. Terry's apartment on the first floor. She found him there and screamed. He brushed her aside, told her he was an officer, and unlocked the outer doors of the house to admit Blick and Clark. The three officers searched the rooms on the first floor, which were not locked. They then searched rooms on the second floor, starting at the front and working back. When they came upon a locked door at the back of the hall, Ogle mounted a chair and looked over the transom into what proved to be the room rented by appellant McDonald. There he saw both appellants, and also adding machines, numbers slips, and money. He called to McDonald to open the door. McDonald did so and the police entered his room, arrested him and Washington, and seized property which is described in the motion for return as adding machines, a suitcase containing papers, and \$968. in money. The officers had no search warrant for the house or for McDonald's room, and no warrant of arrest for anyone.

In order to complain of an unlawful search and seizure, one must have an interest in the place searched or the property seized.¹ The appellants cannot complain that an unlawful entry was made into Mrs. Terry's first floor apartment in which they had no interest, nor were they concerned with the search of the rooms of the upper floor occupied by others, nor could Washington protest against an unlawful search of McDonald's room, had there been one. It does not appear that any search was made of the hall on the second floor, which after all was used in common by all the tenants and their guests. The closest approach to a search of McDonald's room was the act of the officer in looking through the transom at McDonald and Washington engaged in an unlawful activity. Having observed the commission of a misdemeanor in his presence, the policeman and his fellow officers were justified in knocking at the door, demanding entrance, and arresting the defendants.

The only problem in the case is whether looking through the transom amounted to an unlawful search. It was not gentlemanly to spy on McDonald in that manner, but his constitutional rights were not thereby invaded. In *United States v. Lee*, 274 U. S. 559, 563, the Supreme Court held that the use of a search light by a Coast Guard patrol boat by means of which contraband liquor on a motor boat was observed, did not amount to a search. That case was cited in *Safarik v. United States*, 62 F. (2d) 892, 895 (C. C. A. 8th 1933), in which a flash light was used. *Smith v. United States*, 2 F. (2d) 715 (C. C. A.

¹ *Gibson v. United States*, 80 U. S. App. D. C. 81, 149 F. (2d) 387, cert. denied sub. nom. *O'Kelley v. United States*, 326 U. S. 724.

4th 1924), is another flash light case to the same effect. See also *People v. Marvin*, 358 Ill. 426, 193 N. E. 202; *Koscielski v. State*, 199 Ind. 546, 158 N. E. 902; *Crowell v. State*, 147 Tex. Cr. R. 299, 180 S. W. (2d) 343.

Many cases from both state and federal courts hold the word "search" connotes uncovering that which is hidden, prying into hidden places for that which is concealed. It is not a search to observe what is open to view. In *Olmstead, et al. v. United States*, 277 U. S. 438, 465, the wire tapping decision, the court remarked that the liberal construction given to the Fourth and Fifth Amendments "cannot justify enlargement of the language employed beyond the possible practical meaning of houses, persons, papers and effects, or so to apply the words search and seizure as to forbid hearing or sight." (Italics supplied.)

For the reasons given, both judgments are

Affirmed

EDGERTON, J., *dissenting*: By guaranteeing freedom from "unreasonable searches and seizures," the Fourth Amendment "forbids every search that is unreasonable; it protects all, those suspected or known to be offenders as well as the innocent . . ."

1. The search of the house was unreasonable and therefore illegal. The house was a dwelling. Search of a dwelling without a warrant is never reasonable except when incidental to a lawful arrest.² Search of this house was not incidental to any arrest either lawful or unlawful. The officers had no right³ to, and did not, break into the house in order to arrest McDonald. It does not even appear that they knew he was present. They broke and entered the house in order to make the illegal search they made. Instead of being incidental to the arrests the search led to the arrests.

The officers searched McDonald's room before they entered it. Though it is "not a search to observe what is open to view," it is a search to open things to view and then observe them. The room and its contents were opened to view by forcible invasion of the house and corridor, and then observed from the corridor. This search of McDonald's room was illegal, like the previous search of the other rooms and for the same reasons. If this had been otherwise what the officers saw might perhaps have justified them in entering the room, making the arrests, and seizing the property. But that is quite immaterial. Since the search was illegal it justified nothing. The arrests and seizures were as illegal as the search itself. "A search prosecuted in violation of the Constitution is not made lawful by what it brings to light,"⁴ and evidence obtained by unlawful search is not made admissible by arresting its owner.⁵ The government

¹ *Go Bart Importing Co. v. United States*, 282 U. S. 244, 357.

² *Agnello v. United States*, 269 U. S. 20, 32-33.

³ *Johnson v. United States*, U. S. , decided Feb. 2, 1948.

⁴ *Byars v. United States*, 273 U. S. 28, 29.

⁵ *Go Bart Importing Co. v. United States*, *supra* note 1; *Taylor v. United States*, 286 U. S. 1.

cannot "justify the arrest by the search and at the same time . . . justify the search by the arrest."⁶

It is true that in order to complain of an unlawful search and seizure one must have an interest in the place searched or the property seized. Appellant Washington had neither, for he was only a guest of appellant McDonald. But McDonald had both. He rented the room searched and he owned the property seized. He was of course entitled to use the corridor. In my opinion illegal search of the room by illegal invasion of the corridor was a plain violation of his constitutional right.⁷

The question is not whether officers may look in an unconventional way into another place, from a place in which they have a right to be and in which the person who complains has no interest.⁸ The question is whether officers may look into a room from a place in which they have no right to be and in which the person who complains does have an interest; the corridor that is the only means of access to his room. A roomer's constitutional right of privacy is a fiction that keeps the word of promise to the ear and breaks it to the hope unless it includes a right not to be spied upon by trespassers who force their way into his corridor. Yet the government contends that search by such trespassers is reasonable and the court decides that it is not a search. Neither of these propositions is comprehensible to me. No doubt a roomer's interest in a corridor is different from a householder's. Probably the one may be called an easement and the other an estate, as the government suggests. But I know of no reason why this difference should be critical here. To hold that McDonald cannot complain because he is only a roomer perverts the letter as well as the spirit of the constitutional guaranty against unreasonable searches and creates a discrimination in civil rights that is out of place in a democratic society.

⁶ *Johnson v. United States*, *supra* note 3.

⁷ Cf. *Brown v. United States*, 83 F. 2d 383 (C. C. A. 3d); *Warman v. United States*, 12 F. 2d 775 (C. C. A. 9th), *cert. denied*, 273 U. S. 716; *Cogg v. United States*, 36 F. 2d 164 (C. C. A. 10th).

⁸ That was the question in the *Lee* case on which the court relies.

[fol. 32] [Stamp:] United States Court of Appeals for the District of Columbia. Filed Feb. 16, 1948. Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, JANUARY TERM, 1948

No. 9524

EARL H. McDONALD, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee

No. 9525

JOSEPH F. WASHINGTON, Appellant

vs.

UNITED STATES OF AMERICA, Appellee

Appeals from the District Court of the United States for the District of Columbia

Before Edgerton, Clark and Wilbur K. Miller, JJ.

Judgment

These appeals came on to be heard on the transcript of the record from the District Court of the United States for the District of Columbia, and were argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgments of the said District Court appealed from in these causes be, and the same are hereby, affirmed.

Per Mr. Justice Wilbur K. Miller.

Dated February 16, 1948.

Dissenting opinion by Mr. Justice Edgerton.

[fol. 33] [Stamp:] United States Court of Appeals for the District of Columbia. Filed Mar. 2, 1948. Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA

No. 9524

EARL H. McDONALD, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee

No. 9525

JOSEPH F. WASHINGTON, Appellant

vs.

UNITED STATES OF AMERICA, Appellee

Designation of Record

The Clerk will please prepare a certified transcript of record for use on petition to the Supreme Court of the United States for writ of certiorari in the above-entitled cause, and include therein the following:

1. Joint appendix to briefs.
2. Opinion.
3. Judgment.
4. This designation.
5. Clerk's certificate.

Charles E. Ford, John Lewis Smith, Jr., Attorneys
for Appellants.

I hereby acknowledge service of a copy of the foregoing motion this 2nd day of March, 1948. John P. Burke, Assistant U. S. Attorney, Attorney for Appellee. C.M.

[fol. 34] UNITED STATES COURT OF APPEALS FOR THE DISTRICT
OF COLUMBIA

I, Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia, hereby certify that the foregoing pages numbered from 1 to 33, both inclusive, constitute a true copy of the joint appendix to the briefs of the parties and the proceedings of the said Court of Appeals as designated by counsel for appellants in the cases of:

No. 9524

EARL H. McDONALD, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee

and

No. 9525

JOSEPH F. WASHINGTON, Appellant

vs.

UNITED STATES OF AMERICA, Appellee

No. —, January Term, 1948, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this fourth day of March, A. D. 1948.

Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia. (Seal.)

[fol. 35] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 19, 1948

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.